(3)

No. 99-967

Supreme Court, U.S.
FILED
FEB 9 2000
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

ALBERT G. MACLEOD,
Petitioner,

v.

GEORGETOWN UNIVERSITY
MEDICAL CENTER, *et al,*
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

REPLY BRIEF FOR PETITIONER

STEPHEN M. TRATTNER
Trattner & Associates
1823 Jefferson Place, NW
Washington, DC 20036
(202)-331-8020

Counsel for Petitioner

15pp

TABLE OF CONTENTS

Page

INTRODUCTION 1

I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257 BASED ON THE TWO CONSTITUTIONAL ISSUES PRESENTED BECAUSE THESE ISSUES WERE BOTH PRESSED AND PASSED UPON BELOW. 2

A. The Due Process And Equal Protection Issues Were Adequately Presented Below. 3

B. The Court Of Appeals Decided The Two Issues Presented And There Is No Independent State Basis For The Court Of Appeals' Decision. 5

II. RESPONDENTS' ARGUMENTS ON THE MERITS DO NOT DIMINISH THE NEED FOR REVIEW ON EITHER ISSUE PRESENTED. 7

A. The Right To Notice Under The Due Process Clause. 7

B. The Right To Be Treated The Same As *Pro Se* Prisoners By The D.C. Superior Court. 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Page**

Cohen v. Cowles, 501 U.S. 663 (1991) 6

Dozier v. Ford Motor Co., 702 F.2d 1189 (D.C. Cir. 1993) 8-9

Hudson v. Hardy, 421 F.2d 1091 (D.C. Cir. 1968) . . . . . *passim*

Jacobsen v. Filler, 790 F.2d 1362 (9th Cir. 1986) 4

Lewis v. Faulkner, 689 F.2d 100 (7th Cir. 1982) 7

M.A.P. v. Ryan, 285 A.2d 310 (D.C. 1971) 4

McNeil v. United States, 508 U.S. 106 (1993) 8

Moore v. Agency for Intern. Development, 994 F.2d 874 (D.C. Cir. 1993) 3, 8-10

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928) 4

Powell v. Alabama, 287 U.S. 45 (1932) 7-8

Street v. New York, 394 U.S. 576 (1969) 4

Taylor v. Kentucky, 436 U.S. 478 (1978) 4, 6, 7

Timms v. Frank, 953 F.2d 281 (7th Cir. 1992) 4

TABLE OF AUTHORITIES--Continued

Cases **Page**

United States v. Williams, 504 U.S. 36 (1992) 6

Yee v. City of Escondido, 503 U.S. 519 (1992) 5

INTRODUCTION

Respondents do not contest that Petitioner's due process and equal protection arguments present significant constitutional issues on which the lower courts are deeply divided -- a split that will remain until resolved by this Court. Nor do Respondents contest that substantial numbers of *pro se* parties are losing their substantive rights due to their inability to understand their procedural obligations under Rule 56. Neither do they dispute that the District of Columbia Superior Court provides Rule 56 notice to *all pro se* prisoners, but *not to all pro se* non-prisoners.

Instead, Respondents devote the vast majority of their Opposition (Opp. 3-11) to the claim that this Court lacks jurisdiction. Respondents claim there is no reason for granting certiorari *only* because the constitutional questions raised in the Petition were not raised below, and therefore the Court of Appeals' decision was based solely on state grounds. This claim is factually and legally without merit. For example, with regard to his due process claim, Petitioner argued before the Court of Appeals that "[i]ndividuals who are appearing *pro se* must be 'given sufficient information to participate in the trial process effectively,'" (App. Br. 8); that "reasonable opportunity presupposes notice," (*id.* 9); that "[t]he form of notice must be sufficiently understandable to one in appellant's circumstances fairly to apprise him of what is required," (*id.* 10); that "this aspect of . . . civil procedure practice is contrary to lay intuition," (*id.* 9); that "[i]t would be unrealistic to impute to a non-prisoner without legal training . . . an instinctual awareness [of his procedural obligations under Rule 56]," (App. Rep. Br. 8); and that "[h]ere a technical (and counter-intuitive) rule of procedure was elevated over a rule of fundamental justice and in the process a *pro se* litigant was deprived of his right to have his case heard on the merits," (*id.* 12). Similarly, with regard to

his equal protection claim, Petitioner argued that "it would be anomalous for a *pro se* felon to be entitled to greater notice and leniency than a *pro se* law abiding citizen asserting the identical claim," (*id.* 8); that "indigent plaintiffs have no more freedom of choice as to legal representation than do prisoners," (App. Br. 10); and that "[w]e do not think there is any rational basis for distinguishing between prisoner *pro se* litigants and general *pro se* litigants when it comes to the application of the [Rule 56] notice rule," (*id.*). Indeed, Respondents acknowledge (Opp. 12-15) at least indirectly that the Court of Appeals actually decided the two issues presented by the Petition, which creates an independent basis for jurisdiction in this Court.

Respondents contend that the Court of Appeals correctly decided these two issues based on the same Circuit decisions, which create the conflict referred to in the Petition. (*Compare* Opp. 12-15 *with* Pet. 16-17, 24-29). In short, Respondents argue the merits of the conflict among the Circuits for each of the two issues presented, but this argument does not detract from the compelling reasons for granting the review set forth in the Petition (at 6-9) -- reasons which Respondents do not challenge in any respect.

I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257 BASED ON THE TWO CONSTITUTIONAL ISSUES PRESENTED BECAUSE THESE ISSUES WERE BOTH PRESSED AND PASSED UPON BELOW.

Respondents correctly observe (Opp. 3-4, 7) that mere reference to "the Constitution" or "due process" in the lower courts is insufficient to obtain jurisdiction in this Court. However, Petitioner's claim to jurisdiction is based on two different, independent grounds. First, these two constitutional issues were adequately presented to the

Court of Appeals and second, the Court of Appeals rejected these arguments, which denied Petitioner his rights under the Constitution.

A. The Due Process And Equal Protection Issues Were Adequately Presented Below.

With respect to the both issues presented before this Court, Petitioner identified before the Court of Appeals the same key federal circuit cases and circuit court split as here. To that end, Petitioner not only presented these issues with supporting arguments -- in addition to those few examples quoted in the Introduction, (*supra* 1-2) -- but did so in the context of the foregoing circuit court split of authority. (App. Br. 8-10; App. Rep. Br. 3-6).

For example, in relying on *Moore v. Agency for Int'l Development*, 994 F.2d 874, 876 (D.C. Cir. 1993), Petitioner argued below that "courts have long-recognized the importance of providing *pro se* litigants with a meaningful opportunity to participate in the judicial process and that notice of technical procedures is critical in affording a meaningful opportunity," (App. Rep. Br. 8-9). Petitioner also argued that the D.C. Superior Court provided a *pro se* manual that "did not explain . . . the summary judgment rule" requirement of submitting counter-affidavits -- it only stated (which is blatantly misleading) that he had to send a one page statement and implies that evidentiary statements are not necessary, (App. Rep. Br. 11; Pet. App.20a-21a), and as a result, "a technical (and counter-intuitive) rule of procedure was elevated over a rule of fundamental justice, and in the process a *pro se* litigant was deprived of his right to have his case heard on the merits," (*id.* 12). Furthermore, Petitioner argued that "[r]ules of procedure do not require sacrifice of the rules of fundamental justice," (*id.*). Indeed, these last two statements in and of themselves should have been sufficient to alert the Court of Appeals to Petitioner's

reliance on due process principles. *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978) ("Petitioner's contemporaneous objection to the refusal of his request[ed jury instruction] . . . invoked 'fundamental principles of judicial fair play.' This should have sufficed to alert the trial judge to petitioner's reliance on due process principles.").

Similarly, Petitioner argued that the Seventh Circuit's holding in *Timms v. Frank*, 953 F.2d 281, 285-286 (7th Cir. 1992), correctly rejected the Ninth Circuit's holding in *Jacobsen v. Filler*, 790 F.2d 1362 (9th Cir. 1986), by expressly holding that "all *pro se* litigants, not just prisoners, are entitled to notice of the consequences of failing to respond to a summary judgment motion," (App. Br. 10, n.2). Petitioner also argued that under *M.A.P. v. Ryan*, 285 A.2d 310 (D.C. 1971), the D.C. Superior Court is required to and in fact does provide the *Hudson v. Hardy*, 421 F.2d 1091 (D.C. Cir. 1968), Rule 56 notice to *all pro se* prisoners, and that there was no "rational basis for distinguishing between prisoner *pro se* litigants and general *pro se* litigants when it comes to the application of the notice rule," (App. Br. 10, n.2; App. Rep. Br. 8). In addition, Petitioner addressed the issue of cost in an equal protection context by demonstrating that the cost to provide equal protection to the two groups of *pro se* parties "would be minuscule," and "would not be onerous for the [D.C.] superior court to administer," (App. Br. 12).

Thus, this Court has jurisdiction not because of any constitutional labels or "particular form of words or phrases," but rather, because both issues were "brought to the attention of the state court with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *accord Street v. New York*, 394 U.S. 576, 584-585 (1969); *see Taylor*, 436 U.S. at 483. Finally, although it is correct that Petitioner has added further support in his Petition for the two issues presented below, that fact does not deprive

this Court of its jurisdiction over the Petition. *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

B. The Court Of Appeals Decided The Two Issues Presented And There Is No Independent State Basis For The Court Of Appeals' Decision.

The fact that these same two issues presented here were raised below is also demonstrated by a review of the Court of Appeals' decision (Pet. 5, App. 1a-14a). For example, with regard to Petitioner's Due Process claim, the Court of Appeals stated that "as far as this record shows, appellant chose to proceed *pro se*," (*id.* 12a); that despite "his comment in the surreply . . . indicating his mis-understanding of the pretrial process and summary judgment," there was "no reason why he should not have known by this point that he had to make at least a minimal disclosure of the substance of the evidence with which he was to prove his case," (*id.* 12a-13a); that "the failure of a *pro se* litigant to take some particular step can almost always be ascribed to a misunderstanding of an applicable legal requirement," and thus, "[a] litigant's making explicit that which is implicit does not change the fundamentals of our analysis," (*id.* 13a); that "the present federal rules [from where Civ. Rule 56 is derived] . . . already apprise litigants of their summary judgment obligations," (*id.*); that "appellant here was at liberty, he was literate, and he clearly had access to legal materials as demonstrated by his motions and other submissions throughout discovery," (*id.* 11a); that "[t]o give that advice would entail the district court's becoming a player in the adversary process rather than remaining its referee," (*id.* 14a); that the Superior Court cannot be criticized for its *pro se* handbook because it made an effort to help (*id.* 6a) and therefore, the Superior Court's failure to provide Petitioner with notice of his Rule 56 obligations did not entitle him to a reversal of the summary judgment, (*id.* 14a).

Similarly, with regard to Petitioner's Equal Protection claim, the Court of Appeals held that despite the fact that the Superior Court is required to provide the *Hudson* Rule 56 notice to *all pro se* prisoners, such a notice requirement did not apply to *pro se* non-prisoners because "[i]t is the element of 'choice' that most clearly distinguishes the *pro se* prisoner cases from the suit at bar," (*id.* 10a); that "when the unwilling self-representation is coupled with the further obstacles placed in a prisoner's path by his incarceration . . . it seems appropriate to apply the requirements of the summary judgment rule with less than 'strict literalness,'" (*id.*), and therefore, the Superior Court's failure to provide Petitioner with notice of his Rule 56 obligations was justified and did not entitle him to a reversal of the summary judgment, (*id.* 14a).

In addition, Respondents' Opposition (Opp. 12-15) demonstrates that these issues were decided below: Respondents embrace the Court of Appeals' analysis which rejected these two issues and relied upon the same Circuit decisions that create the conflict relied upon by Petitioner to demonstrate the split of authority. (Pet. 5, 16-17). Indeed, the fact that the Court of Appeals decided these same two issues provides an independent basis for jurisdiction under 28 U.S.C. § 1257. *See Cohen v. Cowles*, 501 U.S. 663, 667 (1991); *accord United States v. Williams*, 504 U.S. 36, 45 (1992). Finally, the fact that the Court of Appeals found that the summary judgment was appropriate because Petitioner failed to submit countering-affidavits (Opp. 10, 16-17) does not create an independent state ground because the absence of that evidence is directly related to the violation of Petitioner's constitutional rights. *See Taylor*, 436 U.S. at 483 (even though the Kentucky court decided the issue based on a procedural default, this did not suffice to preclude jurisdiction in this Court where an infringement of a constitutionally-protected right occurred).

II. RESPONDENTS' ARGUMENTS ON THE MERITS DO NOT DIMINISH THE NEED FOR REVIEW ON EITHER ISSUE PRESENTED.

A. The Right To Notice Under The Due Process Clause.

As previously noted, Respondents do not challenge that the Circuits are in disarray on the issue of whether the right of access to the courts, notice, and a reasonable opportunity to participate in the trial process requires Rule 56 notice to all *pro se* parties. As to the merits -- which do not diminish the need for this Court's review -- Respondents (Opp. 13), like the Court of Appeals, claim that notice is not necessary because Rule 56 clearly apprises a *pro se* party of what is required to oppose the motion including the need of counter affidavits, and therefore the mere passing reference to Rule 56 in a motion for summary judgment (which is all that Respondents did below; *compare* C.A. App. 17 *with* 23-27 *and* 66-71) is sufficient. However, this argument not only mischaracterizes the plain language of Rule 56, but it is also at odds with the unchallenged empirical studies referred to in the Petition (at 7, 18-19, 26-27) that demonstrate that there are substantial numbers of *pro se* persons whose substantive rights are being lost because of their lack of understanding of procedural requirements, and the observations of distinguished jurists like Chief Judge Posner that assuming a *pro se* party will understand the need for counter affidavits in opposing a motion for summary judgment is wholly unjustified. *Lewis v. Faulkner*, 698 F. 2d 100, 102 (7th Cir. 1982). Further, this contention is inconsistent with this Court's observations in *Powell v. Alabama*, 287 U.S. 45, 69 (1932), that it is wrong to assume that laymen will have the same understanding of the law as attorneys. "Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Id.*

Respondents also argue (Opp. 13-15) that requiring Rule 56 notice to *pro se* non-prisoners impermissibly permits the court to become a "player in the adversary process." But that argument cannot possibly be right. This Court has repeatedly required courts to provide notice and assistance to *pro se* parties in procedural matters and the Circuits, and even the Court of Appeals, require the same without any finding that the court loses its objectivity or becomes a player in the adversary process. (Pet. App. 7a, 9a-10a; Opp. 14). Perhaps the clearest refutation of this argument is that the D.C. Superior Court and all Circuits (except for one) require this same Rule 56 notice to *pro se* prisoners without any concern, let alone a finding, that the court becomes a "player" in the adversary process and thereby loses its neutrality.

Respondents' and the Court of Appeals' reliance on this Court's decision in *McNeil v. United States*, 508 U.S. 106 (1993), and *Dozier v. Ford Motor Co.*, 702 F.2d 1189 (D.C. Cir. 1993) to support this neutrality justification is misplaced. Contrary to Respondent's assertion (Opp.12), this Court in *McNeil* did *not* address the issue of notice under the Federal Rules, and indeed recognized (508 U.S. at 113) that circumstances do require treating *pro se* plaintiffs differently from plaintiffs represented by counsel. In that case, this Court only held that the *pro se* status of a party can not justify courts to alter the jurisdictional requirements for standing that Congress mandated. *McNeil*, 508 U.S. at 112-113. Similarly, in *Dozier*, the D.C. Circuit did not even discuss, let alone attempt to limit its *Hudson* Rule 56 notice requirement, nor did that court consider *Dozier* in its subsequent holding in *Moore*, 994 F.2d at 874, that the *Hudson* Rule 56 notice applies to all *pro se* parties. In *Dozier*, a *pro se* complaint was dismissed for lack of subject matter jurisdiction. The *pro se* party refiled the same complaint which was again dismissed. In affirming the second dismissal, the D.C. Circuit held that the *pro se* status could

not be relied upon in the *second* action -- not because *pro se* parties are not entitled to assistance from the court as Respondents argued, but because the first district court had given the *pro se* party "assist[ance]" concerning the jurisdiction issue, and the *pro se* party -- who was an "attorney" -- stated he "understood" the significance of the district court's assistance. *Dozier*, 702 F.2d at 1195. By stark contrast, here the D.C. Superior Court provided a *pro se* manual that is blatantly misleading in describing a *pro se* party's obligations in responding to a motion for summary judgment (Pet. App. 20a-21a), failed to offer any helpful assistance, and when Petitioner expressly stated his fundamental *misunderstanding* of his obligations under Rule 56, i.e. that he believed he did not have to submit the expert testimony from his identified treating physicians at that time, (C.A. App. 57; Opp. 3), the Court did not offer any assistance like the initial court in *Dozier* and instead dismissed his case with prejudice for failing to submit that expert testimony in affidavit form as required by Rule 56.

B. The Right To Be Treated The Same As *Pro Se* Prisoners By The D.C. Superior Court.

Respondents correctly acknowledge (Opp. 14) that the D.C. Superior Court is required to give all *pro se* prisoners the *Hudson* Rule 56 notice when a summary judgment motion is filed against them. However, Respondents' attempt (Opp. 5) to create the appearance that there is a lack of unequal treatment is without merit. The invidious discrimination is undeniable because *Hudson* does not permit an analysis of the circumstances to determine whether notice is required for *pro se* prisoners, but rather requires Rule 56 notice to be provided to *all pro se* prisoners, *Hudson*, 421 F.2d at 1094-1095, and the absence of that notice is critical because the Superior Court *pro se* manual (Pet. App. 20a-21a) provides no Rule 56 notice. Indeed, as the D.C. Circuit later explained, the reason why an analysis

of the particular circumstances of a *pro se* prisoner is prohibited is because the right to "participate in the trial process effectively" is a fundamental right which requires that all *pro se* litigant prisoners and non-prisoners alike, be "given sufficient information" to protect this right. *See Moore*, 994 F.2d at 876.

Respondents' reliance on *Hudson* (Opp. 12) to justify the disparate treatment here is misguided. As explained above, the D.C. Circuit in *Moore* does not agree that the purported "handicaps" referred to in the *Hudson* decision were material to its holding that all *pro se* parties need court-ordered notice. *Moore*, 994 F.2d at 876. Moreover, like the Court of Appeals, Respondents (Opp. 14-15) attempt to justify the different treatment given to *pro se* non-prisoners based on a contention of preserving the court's neutrality. This contention, even if correct, is misguided for purposes of responding to Petitioner's equal protection question because the D.C. Superior Court provides Rule 56 notice to *all pro se* prisoners and therefore whether or not such notice to all *pro se* non-prisoners would fail to preserve its neutrality for them is irrelevant to this invidious discrimination.

CONCLUSION

For all the foregoing reasons and the reasons set forth in the Petition, the petition for writ of certiorari should be granted.

Respectfully submitted.

STEPHEN M. TRATTNER
Counsel of Record
Trattner & Associates
1823 Jefferson Place, N.W.
Washington, D.C. 20036-2554
202-331-8020

Counsel for Petitioner

February, 2000